No. 91-835

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

RICHARD CALDER, Petitioner

v.

RETA JOB, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF UTAH

# REPLY BRIEF

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I. RESPONDENT ERRONEOUSLY USES NON-BANKRUPTCY CASES TO INTERPRET THE MEANING OF 28 U.S.C. SECTION 1334.

DiAntonio v. Pennsylvania State University. 455 F.Supp. 510 (M.D. Pa. 1978) involved a suit filed in 1977 before the Bankr. Reform Act was enacted. An employee alleged violations arising under Civil Rights Act 42 U.S.C. Sect. 1983 and Sect. 1985. The issue was in which court, federal or state, should the alleged civil rights violations be litigated. The cite of Resp. at p. 16 relates to the fact that concurrent jurisdiction over actions arising under 42 U.S.C. Sect. 1983 exists in both the state and federal courts. This clearly is not pertinent to the meaning of 28 U.S.C. Section 1334.

State v. Johnson, 100 Utah 366, 114 P.2d 1034 (1941) involved a prosecution alleging an alteration of a brand on a cow. The question of the proper court to so prosecute involved the meaning of "original" in

Art. VIII Sect. 7 of the Ut. State Const. The proper state court to prosecute hasn't anything to do with the meaning of 28 U.S.C. Sect. 1334.

Plaquemines Tropical Fruit Co. v. Henderson, 170 U.S. 511 (1898) is not relevant because the court interprets Art. III Sect. I of the Const. of the U.S. in holding that the mere extension of the judicial power of the U.S. to suits by a state against citizens of other states does not of itself divest the state courts to hear and determine such cases unless Congress has invested the federal courts with exclusive jurisdiction in such cases. The Bankr. Reform Act of 1978 through 28 U.S.C. Sect. 1334(a) gave the bankruptcy court originally exclusive jurisdiction to handle any matter which was related to or in any way connected with a bankruptcy case.

II. THE JOB STATE COURT JUDGMENT WAS BASED EXCLUSIVELY ON CONDUCT OF CALDER THAT OCCURRED PRIOR TO FEB. 23, 1984--THE DATE THE CALDER CHAPTER 13 WAS FILED.

It is impossible to take seriously the

claim of Pt. IV of Resp. at p. 22 that Job's claims against Calder involved primarily acts of Calder after he filed his Ch. 13 on Feb. 23, 1984.

The judgment is analyzed as follows (A-15 to A-17 Resp. Brief):

| | |
|---|---|
| (a) Diminuation in value of Pocklington suit. This was because of failure of Calder to list suit as an asset in 1983 Job Ch. 7 Bankr. | $18,000.00 |
| (b)(1) Costs of federal suit All incurred in 1983 | $ 3,600.00 |
| (b)(2) Bankr. costs. Proximately caused by 1983 acts of Calder | $ 990.00 |
| (c) Loss of equity in Job home. Caused ultimately because of asset omission in Job 1983 Ch. 7 bankr. | $12,574.00 |
| (d) Reckless conduct in 1983 of Calder. He failed to list asset in Job Ch. 7 | $10,000.00 |
| (e) Malicious conduct of Calder. He failed to rectify 1983 omission of asset | $10,000.00 |
| Total amount of Job judgment against Calder | $54,564.00 |

Each of the above components of the judgment was ultimately traceable to and proximately caused by the omission by Calder of the Pocklington suit from Jobs' Ch. 7 bankr. This conduct of Calder in 1983 was prior to the filing date of the Calder 1984 Ch. 13.

Job filed a proof of claim in Calder's Ch. 13 claiming the $54,564.00 owed to Job existed as of Feb. 23, 1984, the filing date of Calder's Ch. 13 case.

III. THE TRIAL COURT DID EXERCISE JURISDICTION OVER PROPERTY OF THE ESTATE IN CALDER'S 1984 CHAPTER 13.

It is impossible to take seriously the claim of Resp. that the judgment entered in the Dist. Ct. of Salt Lake County (A-1 Resp. Brief) on Feb. 24, 1986 (A-1 Resp. Brief) was not an exercise of jurisdiction over the real property of Calder located in Salt Lake County, his home.

U.C.A. 78-22-1 (App. A Reply Brief) states that a judgment in the district court (in this

case Salt Lake County) becomes a lien when docketed upon all the real property of the judgment debtor in the county in which the judgment is entered--the Calder home is located in Salt Lake County. Obviously, docketing the Job state court judgment in 1986 automatically creates a lien on real property of the 1984 Calder Ch. 13 estate and is therefore an exercise of jurisdiction by a state court over property (home) of the Calder Ch. 13 1984 bankr. estate.

A judgment docketed in another county in the state creates a lien on property of the debtor in that county. (App. A Reply Brief.) If the Ut. state court was not exercising in rem jurisdiction over property of the Calder Ch. 13 bankr. estate in Utah county, then what was the purpose of Job and his attorney in docketing the Job judgment in Utah county on March 14, 1986 (App. B Reply Brief)? Obviously, the purpose was to exercise control over real property of the Calder Ch. 13 estate located in Utah county.

It is very clear that the Utah state trial court in 1986 was as to pre-petition claims of Job exercising jurisdiction over real property of Calder's 1984 Ch. 13 bankruptcy estate (his home and real property in Ut. county) and it is sad that counsel either through ignorance or malicious design misleads the nation's highest court.

IV. THERE ARE SERIOUS FACTUAL ERRORS IN THE BRIEF OF RESPONDENT.

A factual error that is indicative of the mistakes that seem to pervade the Brief of Resp. is the statement on p. 4 at Note 1 that "the Jobs did not obtain relief from the automatic stay because they did not know Calder was in bankruptcy." As proof for this statement, Resp. cites to petitioner's statement at para. 10 of p. 6 of his Petition which states that "the Jobs were not aware of the Ch. 13 filing until sometime in Feb. 1986, shortly prior to entry of the state court judgment against Calder." It is hard to think opposing counsel seriously believes that the

Jobs failed to utilize the automatic stay because "they did not know Calder was in bankruptcy." This is especially so when Resp. at p. 6 para. 11 of their Brief makes the statement that Job knew Calder was in a Chapter 13 as early as Feb. 5, 1984. The Job judgment was entered Feb. 24, 1986.

V. THE RAISING BY RESPONDENT OF THE ISSUE OF THE APPLICATION OF THE AUTOMATIC STAY TO THE JOB CLAIM IS NOT RELEVANT TO THE ISSUE OF THE MEANING OF THE LANGUAGE OF "ORIGINAL BUT NOT EXCLUSIVE" IN 28 U.S.C. SECTION 1334(b).

As to the Job claim against Calder, the question of the lifting of the automatic stay is a federal bankruptcy administration question which falls exclusively under the aegis of 11 U.S.C. Sect. 362. It does not involve the jurisdictional question posed by 28 U.S.C. Sect. 1334.

Whether the Jobs had a valid state court pre-petition cause of action against Calder is a state law tort question. The jurisdictional question as to which court--the state trial court or the federal bankruptcy court--

shall determine the underlying merits of this tort claim has nothing to do with 11 U.S.C. Sect. 362.

Justice Brennan in Northern Pipeline Const. Co. v. Marathon Pipeline Co., 458 U.S. 50, 71, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1981) writing for a plurality distinguished "the restructuring of debtor-creditor relations, which is the core of the federal bankruptcy power" from "the adjudication of state created private rights."

The raising by Resp. of the applicability of the automatic stay by Calder against the Job claim in the Calder bankr. is simply not relevant because the question involves 11 U.S.C. Sect. 362 and not 28 U.S.C. Sect. 1334.

The utter confusion of Resp. as to the separate nature of the Sect. 362 automatic stay question and the Sect. 1334 jurisdictional question is illustrated by counsel twisting the holding of In re Calder, 907 F.2d 953 (10th Cir. 1990) in order to somehow make

favorable use of this ruling. In In re Calder, supra, counsel erroneously states at p. 12 that the court held that "the automatic stay did not apply to invalidate the Jobs' state court judgment because of Calder's inequitable conduct of failing to notify the Jobs and the state court of his bankruptcy after the state court had found Calder liable at trial," (emphasis added). Attributing the lack of any notification by Calder as the conduct which was inequitable is simply wrong. What the Tenth Circuit held in In re Calder, supra, at 756 was that it would be inequitable to allow Calder protection under Sect. 362(a) because he "did not provide notice of the pending Chapter 13 proceeding until just before the state court was to enter final judgment."

The inequitable conduct was not the utter failure of Calder to notify the state court he was in bankruptcy but rather the inequity found by the Tenth Circuit was the belated nature of the actual Calder notification.

Counsel for Resp. improperly mixes the separate distinct question of the automatic stay and the separate distinct jurisdictional question as if these completely separate and distinct questions were simply different aspects of a single unitary question.

All the language of Resp. about the automatic stay should be ignored because the issue posed by Petitioner is not what does 11 U.S.C. Sect. 362 mean but instead the issue is what is the meaning of 28 U.S.C. Sect. 1334?

## VI. THE DOCTRINE OF ABSTENTION PERMITS A FEDERAL COURT TO EXERCISE ITS DISCRETION TO RELINQUISH JURISDICTION.

Resp. erroneously defines the doctrine of abstention at p. 17 that "Abstention is a decision of a federal court not to exercise jurisdiction it possesses over a particular dispute because another court has jurisdiction," (emphasis added).

The correct doctrine of abstention as defined by the Supreme Ct. of the U.S. was summarized in Surowitz v. New York City Em-

ployees' Retirement System, 376 F.Supp. 369, 378 (D.C. S.D. N.Y. 1974), thus:

> ...the doctrine of abstention, which permits a federal court in the exercise of its discretion to relinquish jurisdiction (emphasis added) where necessary to avoid needless conflict with the administration by a state of its own affairs. Alabama Public Service Commission v. Southern Ry., 341 U.S. 341, 71 S.Ct. 762, 95 L.Ed. 1002 (1951); Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943); see C. Wright, Law of Federal Courts, Sect. 52, at 199-200 (2d ed. 1970).

Under 28 U.S.C. Sect. 1334(a), the bankruptcy court "shall have original and exclusive jurisdiction of all cases under Title 11." Collier on Bankruptcy at Vol. I, para. 3.01, p. 3-10, in discussing the differences between jurisdiction under the Bankr. Reform Act of 1978 and the 1898 Bankr. Act states that jurisdiction was to exist in the bankruptcy court "to hear any matter which was related to or in any way connected with the Title 11 case."

Collier on Bankruptcy, Vol. I, para. 3.01, at p. 3-22, states that the intent of Congress

was "to bring all bankruptcy-related litigation within the umbrella of the district court, at least as an initial matter... (emphasis added).

Resp. concedes at p. 13 that "the Jobs' state law tort dispute was 'related to' Calder's bankruptcy because the 'outcome ... could conceivably have an effect on the estate being administered in bankruptcy.'" By this statement, Resp. admits that the bankr. ct. originally had exclusive jurisdiction under 28 U.S.C. Sect. 1334(a) of the Calder Chapter 13 case which would obviously include original jurisdiction over the Job claim because it was a matter admitted by Resp. to be related to and connected with the Calder Ch. 13 bankr. case.

The flaw in the thinking of Resp. is for Resp. to falsely claim that the state trial court and the Bankr. court at the commencement of the Calder bankr. in 1984 each had concurrent jurisdiction of this pre-petition 1983 state law tort claim. This

position of Resp. is a direct negation of 28 U.S.C. Sect. 1334(a)--which is the basic essence of the Bankr. Reform Act of 1978.

Resp. statement at p. 14 that "state courts retain concurrent subject matter jurisdiction over proceedings such as the Jobs" is obviously false because of 28 U.S.C. Sect. 1334(a) and the federal abstention doctrine implemented at 28 U.S.C. Sect. 1334(c).

The peculiar facts of each of the bankruptcy cases cited by Resp. render them meaningless as to the instant case. The language cited by Resp. from these cases is only meaningful in a completely different context than the facts of the instant case.

In re Bellucci, 119 B.R. 763 (Bankr. E.D. Cal. 1990) involved a lengthy consideration by a bankr. court whether abstention was proper. The ct. decided to abstain and the language cited by Resp. at p. 14 has reference to the jurisdiction of the state court after abstention by the bankruptcy court.

Brock v. Marysville Body Works, Inc., 829 F.2d 383 (3d Cir. 1987) involved a jurisdictional question raised in the context of the OSHA jurisdictional provision of 29 U.S.C. Section 660 and a Chapter 11 case. A second federal jurisdictional statute makes this case not applicable.

Bill Walker & Associates v. Parrish, 770 S.W. 2d 764 (Tenn. App. 1989) involved a state claim against an officer of a corporation in a Ch. 11 in which the claim unlike the Job claim had absolutely no connection with the corporate Ch. 11.

In re Clowser, 39 B.R. 883 (Bankr. E.D. Va. 1984) involved the inherent power of a state court to punish an act of a Ch. 13 debtor committed pre-petition in contempt of a state court. Since there exists not any contempt of court matter in the instant case, therefore this case and the language are out of place.

Fitzgerald v. Critchfield, 744 P.2d 301 (Utah Ct. App. 1987) involved a post-petition

not a pre-petition claim and acts of a debtor not acts of a creditor. These two fundamental points of divergence makes it not relevant in deciding the Job-Calder problem of the correct court to originally exercise jurisdiction over a pre-petition claim of a creditor against a debtor.

CONCLUSION

The Resp. Brief in opposition is marred by pervasive and unrelenting error.

DATED this 13th day of January, 1992.

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# APPENDIX A

## Utah Code Annotated 78-22-1

78-22-1: Lien of judgment.

From the time the judgment of the district court or circuit court is docketed and filed in the office of the clerk of the district court of the county it becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in the county in which the judgment is entered, owned by him at the time or by him thereafter acquired during the existence of said lien. A transcript of judgment rendered in a district court or circuit court of this state, in any county thereof, may be filed and docketed in the office of the clerk of the district court of any other county, and when so filed and docketed it shall have, for purposes of lien and enforcement, the same force and effect as a judgment entered in the district court in such county. The lien shall continue for eight years unless the judgment is previously satisfied or unless the enforcement of the judgment is stayed on appeal by the execution of a sufficient undertaking as pro-

vided by law, in which case the lien of the judgment ceases.

# APPENDIX B

## Transcript of Judgment Docketed with Clerk of Utah County and Note from Job's Attorney

TRANSCRIPT OF JUDGMENT

| Judgment Debtors | Judgment Creditors | Judgment | Time of Entry | Where Entered in Judgment Book |
|---|---|---|---|---|
| RICHARD CALDER | DENNIS R. JOB AND RETA JOB | $54,564.00 Interest: Plus Interest thereon at rate of 12% per annum from the date of entry hereof | 2/26/86 8:30 AM | BK. 204 NO. 3263 |

C-84-5436

DENNIS R. JOB AND RETA JOB

Plaintiff

Against

RICHARD CALDER

Defendant

CLERK'S OFFICE, DISTRICT COURT,
THIRD JUDICIAL DISTRICT

The State of Utah )
: ss.
County of Salt Lake )

THIS IS TO CERTIFY, That the foregoing is a full, true and correct transcript of the entries in the above entitled action, as the same appear in the judgment docket kept at my office.

ATTEST my hand and Seal of said Court, this 11th day of March, 1986

H. DIXON HINDLEY
Clerk

By Sophie P. Orvin
Deputy Clerk

FROM THE DESK OF PETER H. WALDO

TO: Utah County Clerk:

Enclosed please find a transcript of Judgment and $10 check for filing. It is my understanding the transcript is treated the same as an abstract of judgment, and that it will create a judgment lien on any property the defendant might own in Utah County. If this is not true, please contact me immediately. My phone number is 364-1142. Thank you.

P. H. Waldo

$4 in cash sent back--tm